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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RAYMOND ROBINSON,

Plaintiff,

v.

DAVID RUBIN AND BRIAN
CORNELL,

Defendants.

Case No. 08-CV-0244 DMS (BLM)

DEFENDANT JUDGE RUBIN'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT WITH
PREJUDICE

**[No Oral Argument Pursuant to Civil
Local Rule 7.1(d.1)]**

Date : July 11, 2008
Time : 1:30 p.m.
Crtrm : 10 (2nd Floor)
Judge : The Hon. Dana M. Sabraw

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I.

SUMMARY

Defendant, the Honorable David Rubin (“Judge Rubin”), Judge of the Superior Court of California, County of San Diego (“California Court”), hereby moves that this Court dismiss the first amended complaint filed May 1, 2008, and the entire action against him, with prejudice. The first amended complaint arises from Plaintiff’s apparent dissatisfaction with the proceedings in his underlying California Court criminal infraction case. Plaintiff is claiming civil rights violation(s) and conspiracy, and seeks monetary and other damages. However, his complaint is barred by state sovereign immunity, judicial immunity, and based on abstention doctrines.

II.

BACKGROUND

On February 7, 2008, Plaintiff filed his Complaint in this federal lawsuit, arising out of Plaintiff’s dissatisfaction with criminal infraction proceedings before Judge Rubin.¹ Judge Rubin filed a motion to dismiss the complaint with prejudice on February 28, 2008. The court took the motion to dismiss under submission on April 24, 2008. On May 5, 2008, the Court authorized Plaintiff’s filing of a First Amended Complaint (hereafter, “FAC”), nunc pro tunc to May 1, 2008. On May 6, 2008, the court then denied Judge Rubin’s motion to dismiss as moot.

After trial in the underlying California Court criminal infraction case, Judge Rubin found Plaintiff herein guilty of an infraction violation of California Vehicle Code section 21804, subdivision (a).² Plaintiff appealed.³ Among his grounds of

¹ The infraction citation had been issued on November 15, 2006, by San Diego Police Officer Brian Cornell (Judge Rubin’s co-Defendant in the instant proceeding).

² California Vehicle Code section 21804 [Entry onto highway], subdivision (a), provides: “The driver of any vehicle about to enter or cross a highway from any public or private property, or from an alley, shall yield the right-of-way to all traffic,

1 appeal were: “3. The trial court solicited legal advice from the government’s
 2 witness, then relied thereupon for its ruling; [P] ... 5. The trial court erred where
 3 directing the government’s witness to argue the government’s case...”⁴
 4 Respondent submitted without objection on the merits of the appeal.⁵ On January
 5 18, 2008, the appellate panel reversed the judgment of the trial court, and
 6 dismissed the case in the interests of justice.⁶ The remittitur issued on February 5,
 7 2008.⁷ Plaintiff thereafter filed this lawsuit on February 7, 2008, with his first
 8 amended complaint deemed filed on May 1, 2008.

10 as defined in Section 620, approaching on the highway close enough to constitute an
 11 immediate hazard, and shall continue to yield the right-of-way to that traffic until he
 12 or she can proceed with reasonable safety.”

13 ³ Request for Judicial Notice, Exhibit A, Engrossed Settled Statement on
 14 Appeal filed July 14, 2007, in *People of the State of California v. Raymond Robinson*,
 15 California Court Case No. Y337174, Appellate Division No. CA206475 (hereafter
 “ESS”).

16 ⁴ ESS, 1:22-24, 1:27-28. See also, Request for Judicial Notice, Exhibit B,
 17 Appellant’s Opening Brief on Appeal signed September 11, 2007, in *People of the*
 18 *State of California v. Raymond Robinson*, California Court Case No. Y337174,
 19 Appellate Division No. CA206475, 8:15-12:2.

20 ⁵ Request for Judicial Notice, Exhibit C, Respondent’s Brief on Appeal filed
 21 September 28, 2007, in *People of the State of California v. Raymond Robinson*,
 22 California Court Case No. Y337174, Appellate Division No. CA206475.

23 ⁶ Request for Judicial Notice, Exhibit D, Order dated January 18, 2008, in
 24 *People of the State of California v. Raymond Robinson*, California Court Case No.
 25 Y337174, Appellate Division No. CA206475. In this order, the court cited *People v.*
 26 *Kriss*, 96 Cal. App. 3d 913 (1979), which reads at page 921: “Given the relatively
 27 minor nature of the infractions involved and the fines imposed, and the necessity for
 28 retrials which an unqualified reversal would require, we conclude that in these
 instances it would not be in the interest of justice to prolong these matters.”

⁷ Request for Judicial Notice, Exhibit E, Remittitur filed February 5, 2008, in

III.

PLAINTIFF'S ALLEGATIONS

Plaintiff's complaint is brought under the Civil Rights Act, 42 U.S.C. § 1983,⁸ for alleged violations of his right to due process, based on Judge Rubin's conduct in the infraction proceeding.⁹ Plaintiff seeks nominal damages of \$1.00, actual damages of \$1,000.00, exemplary damages on "one year's 2007 gross salary from each of said defendants", actual costs, and other relief.¹⁰

Plaintiff also alleges a criminal conspiracy under California Penal Code section 182, subdivisions (a)(1) and (a)(5).¹¹ In the FAC, Plaintiff also claims violations of California Civil Code sections 1708,¹² 1709,¹³ 1710.¹⁴

People of the State of California v. Raymond Robinson, California Court Case No. Y337174, Appellate Division No. CA206475.

⁸ 42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . ."

⁹ Request for Judicial Notice, Exhibit F, First Amended Complaint in *Raymond Robinson v. David Rubin and Brian Cornell* (U.S. Dist. Ct., So. Dist. Cal., 08-CV-0244 DMS (BLM) filed May 1, 2008, 2:20-3:19.

¹⁰ FAC, 5:9-16.

¹¹ FAC, 4:21-25. California Penal Code section 182 [Criminal conspiracy; Acts constituting; Punishment; Venue], subdivision (a) provides in pertinent part:

"(a) If two or more persons conspire:

(1) To commit any crime...

1
2 ... (5) To commit any act injurious to the public health, to public morals, or
3 to pervert or obstruct justice, or the due administration of the laws...

4 ... They are punishable as follows:

5 ... When they conspire to commit any other felony [other than specified in
6 paragraph (6)], they shall be punishable in the same manner and to the same extent as
7 is provided for the punishment of that felony. If the felony is one for which different
8 punishments are prescribed for different degrees, the jury or court which finds the
9 defendant guilty thereof shall determine the degree of the felony the defendant
10 conspired to commit. If the degree is not so determined, the punishment for
11 conspiracy to commit the felony shall be that prescribed for the lesser degree, except
12 in the case of conspiracy to commit murder, in which case the punishment shall be
13 that prescribed for murder in the first degree.

14 If the felony is conspiracy to commit two or more felonies which have
15 different punishments and the commission of those felonies constitute but one offense
16 of conspiracy, the penalty shall be that prescribed for the felony which has the greater
17 maximum term.

18 ... When they conspire to do any of the other acts described in this section,
19 they shall be punishable by imprisonment in the county jail for not more than one
20 year, or in the state prison, or by a fine not exceeding ten thousand dollars (\$10,000),
21 or by both that imprisonment and fine.

22 ... All cases of conspiracy may be prosecuted and tried in the superior court
23 of any county in which any overt act tending to effect the conspiracy shall be done..."

24 ¹² California Civil Code section 1708 reads: "Every person is bound, without
25 contract, to abstain from injuring the person or property of another, or infringing upon
26 any of his or her rights."

27 ¹³ California Civil Code section 1709 provides: "One who willfully deceives
28 another with intent to induce him to alter his position to his injury or risk, is liable for
any damage which he thereby suffers."

¹⁴ California Civil Code section 1710 states: "A deceit, within the meaning of
the last section, is either: [P] 1. The suggestion, as a fact, of that which is not true,
by one who does not believe it to be true; [P] 2. The assertion, as a fact, of that
which is not true, by one who has no reasonable ground for believing it to be true; [P]
3. The suppression of a fact, by one who is bound to disclose it, or who gives
information of other facts which are likely to mislead for want of communication of
that fact; or, [P] 4. A promise, made without any intention of performing it."

1 IV.

2 ARGUMENT

3 A. Standard of Review.

4 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be
5 granted where there is either a lack of cognizable legal theory upon which to grant
6 relief, or the absence of sufficient facts alleged under a cognizable legal theory.

7 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

8 B. Judicial Immunity Precludes This Lawsuit Against Judge Rubin.

9 As pleaded, Plaintiff's complaint against Judge Rubin arises from his
10 dissatisfaction with Judge Rubin's rulings in the California Court. The complaint,
11 therefore, fails to state a claim upon which relief may be granted against Judge
12 Rubin, because he is immune from liability under the judicial immunity doctrine.

13 *Moore v. Brewster*, 96 F.3d 1240 (9th Cir. 1996) [judicial immunity from claims of
14 fraud and conspiracy based on judge's rulings]; *Ashelman v. Pope*, 793 F.2d 1072,
15 1078 (9th Cir. 1986) (en banc) [judicial immunity from conspiracy claims].¹⁵

16 In the present matter, Judge Rubin is being sued in connection with his
17 exercise of a judicial function. Judges are "not liable to civil actions for their
18 judicial acts, even when such acts are in excess of their jurisdiction, and are alleged
19 to have been done maliciously or corruptly." *Stump v. Sparkman*, 435 U.S. 349,
20 355-356 [98 S. Ct. 1099, 55 L. Ed. 2d 331] (1978), quoting *Bradley v. Fisher*, 80
21 U.S. (13 Wall.) 335, 347 [20 L. Ed. 646] (1871). So long as the challenged judicial

22
23
24 ¹⁵ Plaintiff resists the application of judicial immunity by citing to a
25 dissenting United States Supreme Court justice in *Pierson v. Ray*, 386 U.S. 547,
26 566-567 [87 S. Ct. 1213, 18 L. Ed. 2d 288] (1967). FAC 1:18-22. Under the
27 doctrine of stare decisis, this court is of course bound by United States Supreme
28 Court precedent, as established by a majority of justices. *Hutto v. Davis*, 454 U.S.
370, 375 [102 S. Ct. 703, 70 L. Ed. 2d 556] (1982); *Ray v. Antioch Unified Sch.
Dist.*, 107 F. Supp. 2d 1165, 1169 (N.D. Cal. 2000).

1 act is within the jurisdiction of the court, there is absolute judicial immunity from
 2 liability for the act even where there are allegations of conspiracy. *Dennis v.*
 3 *Sparks*, 449 U.S. 24, 27 [101 S. Ct. 183, 66 L. Ed. 2d 185] (1980).

4 The law of judicial immunity is well established. This law provides that
 5 "judges are absolutely immune from damage actions for judicial acts taken within
 6 jurisdiction of their courts." *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir.
 7 1988), *cert. denied*, 488 U.S. 995 (1988). Furthermore, this is "an immunity from
 8 suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9,
 9 11 [112 S. Ct. 286, 116 L. Ed. 2d 9] (1991). Judicial immunity applies "however
 10 erroneous the act may have been, and however injurious in its consequences it may
 11 have proved to the plaintiff." *Moore v. Brewster*, 96 F.3d 1240, 1244 (9th Cir.
 12 1996), *cert. denied*, 519 U.S. 1118 (1997). As explained in *Ferri v. Ackerman*, 444
 13 U.S. 193 [100 S. Ct. 402, 62 L. Ed. 2d 355] (1979):

14 As public servants, the prosecutor and the judge represent the interest
 15 of society as a whole. The conduct of their official duties may
 16 adversely affect a wide variety of different individuals, each of whom
 17 may be a potential source of future controversy. The societal interest
 18 in providing such public officials with the maximum ability to deal
 19 fearlessly and impartially with the public at large has long been
 20 recognized as an acceptable justification for official immunity. The
 21 point of immunity for such officials is to forestall an atmosphere of
 22 intimidation that would conflict with their resolve to perform their
 23 designated functions in a principled fashion.

Id., at 202-204.

24 In the present matter, Plaintiff has sued Judge Rubin because he presided over
 25 Plaintiff's infraction trial, found him guilty, and then sentenced him. These
 26 proceedings are properly within a California judge's jurisdiction. E.g., *People v.*
 27 *Black*, 41 Cal. 4th 799, 808 (2007) [sentencing]. Such judicial conduct cannot form
 28 the basis of any civil claim because it is protected by the absolute judicial immunity
 doctrine. Plaintiff's FAC, like his original complaint, thus fails to state a claim against

Judge Rubin. As recently repeated in *Miller v. Davis*, 521 F.3d 1142, 1147 (9th Cir. 2008): "In determining judicial immunity, we have distinguished between acts "in excess of jurisdiction" and acts "in the clear absence of jurisdiction" by looking to the subject matter jurisdiction of the judge: "[a] clear absence of all jurisdiction means a clear lack of all subject matter jurisdiction." *Mullis v. U.S. Bankr. Court, Dist. of Nev.*, 828 F.2d 1385, 1389 (9th Cir. 1987)." Ruling on traffic infractions is within Judge Rubin's subject matter jurisdiction. E.g., *People v. Williams*, 145 Cal. App. 4th 756, 760 (2006).

In the FAC, Plaintiff continues to advance his mistaken position that this court is bound by his conclusory allegations relating to legal capacity.¹⁶ However, Plaintiff's conclusory allegations that Defendant Judge Rubin was acting in an individual capacity in the conduct of the infraction hearing below cannot supersede the reality that the pleaded acts occurred in Judge Rubin's official capacity.

A complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atlantic Corp. v. Twombly*, 550 U.S. __ [127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929] (2007). The factual allegations must be definite enough to "raise a right to relief above the speculative level." The pleadings must contain factual allegations "plausibly suggesting (not merely consistent with)" a right to relief. *Id.* at 1965 (noting that this requirement is consistent with Fed. R. Civ. P. 8(a)(2), which requires that the pleadings demonstrate that "the pleader is entitled to relief").

Since the FAC against Judge Rubin is barred by judicial immunity, the action should be dismissed with prejudice.

C. Eleventh Amendment Immunity Bars Plaintiff's Claims.

Plaintiff's action is barred by sovereign immunity. The Eleventh Amendment of the United States Constitution prohibits suits against a state and its

¹⁶ FAC, 5:4-8.

1 agencies and departments for legal or equitable relief. *Federal Maritime*
 2 *Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 753 [122 S. Ct.
 3 1864, 152 L. Ed. 2d 962] (2002); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44,
 4 54 [116 S. Ct. 1114, 134 L. Ed. 2d 252] (1996); *Florida Prepaid Postsecondary*
 5 *Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 670 [119 S. Ct. 2199, 144
 6 L. Ed. 2d 575] (1999).

7 "This jurisdictional bar applies regardless of the nature of relief sought."
 8 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 [104 S. Ct. 900, 79
 9 L. Ed. 2d 67] (1984); *Brooks v. Sulphur Springs Valley Elec. Co-Op*, 951 F.2d
 10 1050, 1053 (9th Cir. 1991) ["The Eleventh Amendment's jurisdictional bar covers
 11 suits naming state agencies and departments as defendants, and applies whether the
 12 relief sought is legal or equitable in nature"], *cert. denied*, 503 U.S. 938 (1992).
 13 Specifically, "the Eleventh Amendment bars suits which seek either damages or
 14 injunctive relief against a state, an arm of the state, its instrumentalities, or its
 15 agencies." *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) (citing
 16 *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1422-23 (9th Cir. 1991)).

17 California has not waived its sovereign immunity. *Atascadero State Hosp.*
 18 *v. Scanlon*, 473 U.S. 234, 241 [105 S. Ct. 3142, 87 L. Ed. 2d 171] (1985); *Dittman*
 19 *v. California*, 191 F.3d 1020, 1025-1026 (9th Cir. 1999), *cert. denied*, 530 U.S.
 20 1261 (2000).

21 The Superior Court is part of the judicial branch of state government created
 22 by the state constitution.

23 The superior courts of the State of California, while located and
 24 functioning in the several counties of the state are not local or county
 25 courts, but constitute a system of state courts, being vested with and
 26 exercising the judicial power of the state under the express terms of
 27 section 1 of Article VI of the state constitution.
 28

1 *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1110 (9th Cir.
 2 1987); *Simmons v. Sacramento Co. Superior Court*, 318 F.3d 1156, 1161 (9th Cir.
 3 2003) [claim against the state court or its employees was barred by the Eleventh
 4 Amendment]; *Sacramento & San Joaquin Drainage Dist. v. Superior Court*, 196
 5 Cal. 414, 432 (1925).

6 State immunity extends to state officers who act on behalf of the state and
 7 can therefore assert the state's sovereign immunity. *Puerto Rico Aqueduct and*
 8 *Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 [113 S. Ct. 684, 121 L.
 9 Ed. 2d 605] (1993); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 [109 S.
 10 Ct. 2304, 105 L. Ed. 2d 45] (1989) [While state officials literally are persons, a suit
 11 against a state official in his or her official capacity is not a suit against the official
 12 but rather is a suit against the official's office; as such, it is no different from a suit
 13 against the State itself]; *Kentucky v. Graham*, 473 U.S. 159, 165 [105 S. Ct. 3099,
 14 87 L. Ed. 2d 114] (1985) [Official-capacity suits generally represent only another
 15 way of pleading an action against an entity of which an officer is an agent].

16 A judge of the Superior Court is a state officer. Cal. Const., art. VI, § 4;
 17 *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1081-1082 (1999); *Meek v.*
 18 *County of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999), *cert. denied*, 528 U.S.
 19 1005 (1999) [holding that municipal court judges are "State officials"].

20 A suit purportedly against an individual official is actually one against the
 21 state if the judgment sought would interfere with the public administration or
 22 effectively restrain the state from acting. *Dugan v. Rank*, 372 U.S. 609, 620 [83 S.
 23 Ct. 999, 10 L. Ed. 2d 15] (1963); *Worcester County Trust Co. v. Riley*, 302 U.S.
 24 292, 299-300 [58 S. Ct. 185, 82 L. Ed. 268] (1937). Here, any injunction or
 25 declaratory relief ordering the California judge or the California Court not to
 26 proceed would operate against the State of California itself, because any state court
 27 can act only through individual adjudicatory officers. Thus, restraining the Judicial
 28 Branch Defendants would effectively restrain the State of California from fulfilling

1 its judicial function, an impermissible result under *Ex Parte Young*, 209 U.S. 123
2 [28 S. Ct. 441, 52 L. Ed. 714] (1908).

3 Under 42 U.S.C. § 1983, a key factor in determining whether an actor is a
4 state or county employee is which entity is liable for damages in a suit against the
5 official. See *McMillian v. Monroe County*, 520 U.S. 781, 789 [117 S. Ct. 1734,
6 138 L. Ed. 2d 1] (1997); accord, *Hyland v. Wonder*, 117 F.3d 405, 413 (9th Cir.
7 1997), *cert. denied*, 522 U.S. 1148 (1998) (quoting *Regents of Univ. of Cal. v. Doe*,
8 519 U.S. 425, 427 [117 S. Ct. 900, 137 L. Ed. 2d 55] (1997) [a crucial factor in
9 determining whether an individual is exercising state or local authority is "who is
10 legally obligated to pay the judgment that is being sought"]; *Mitchell v. Los*
11 *Angeles Community College District*, 861 F.2d 198, 201 (9th Cir. 1988) [factors
12 used to determine whether a particular state entity is a state agency entitled to
13 Eleventh Amendment immunity are "whether a money judgment would be
14 satisfied out of state funds, whether the entity performs central governmental
15 functions, whether the entity may sue or be sued, whether the entity has the power
16 to take property in its own name or only the name of the state, and the corporate
17 status of the entity."], *cert. denied*, 490 U.S. 1081 (1989).

18 Effective July 1, 1997, the State of California assumed sole responsibility
19 for the funding of all state trial court operations, and including litigation. See Cal.
20 Gov't Code §§ 77003, 77200, et seq.; Cal. Rules of Ct., rule 10.810, function
21 10(a)(2), (b) (Allowable costs include salaries and legal services for allowable
22 court operations), rule 10.201 (claim and litigation procedure), rule 10.202
23 (litigation management). Effective January 1, 2003, the California Legislature
24 enacted statutory amendments to the Tort Claims Act that made explicit the state
25 Judicial Council's authority to manage and settle claims and lawsuits. Cal. Gov.
26 Code §§ 912.7, 935.8, 948.1, and 965, subd. (c). The California Trial Court
27 Facilities Act also established a process for transferring responsibility for
28 California's courthouse facilities from counties to the state, and made the judicial

1 branch responsible for the construction and operations of court facilities. Cal. Gov.
 2 Code §§ 70321-70333. Additionally, the Administrative Director of the Courts
 3 may accept on behalf of the state courts any gift of real or personal property only if
 4 the gift and any terms and conditions are found to be in the best interest of the
 5 State of California. Cal. Rules of Ct., rule 10.102. In October 2004, the California
 6 Administrative Office of the Courts, pursuant to the California Trial Court Funding
 7 Act (Cal. Gov. Code §§ 77200-77213), established a centralized statewide
 8 treasury.

9 Hence, Judge Rubin should be dismissed with prejudice under the doctrine
 10 of state sovereign immunity.

11 **D. The District Court Should Dismiss This Action Based on**
 12 **Abstention Doctrine.**

13 This action should be dismissed based on abstention doctrine. "[F]ederal
 14 and state courts are complementary systems for administering justice in our
 15 Nation. Cooperation and comity, not competition and conflict, are essential to the
 16 federal design." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 [119 S. Ct.
 17 1563, 143 L. Ed. 2d 760] (1999).

18 The *Rooker-Feldman* doctrine prevents the lower federal courts from
 19 exercising jurisdiction over cases brought by "state-court losers" challenging
 20 "state-court judgments rendered before the district court proceedings commenced."
 21 *Lance v. Dennis*, 546 U.S. 459 [126 S. Ct. 1198, 163 L. Ed. 2d 1059] (2006),
 22 quoting *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284
 23 [125 S. Ct. 1517, 161 L. Ed. 2d 454] (2005); see also, *District of Columbia Court*
 24 *of Appeals v. Feldman*, 460 U.S. 462, 483, n.16 [103 S. Ct. 1303, 75 L. Ed. 2d 206]
 25 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 [44 S. Ct. 149, 68 L. Ed.
 26 362] (1923); *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1029 (9th
 27 Cir. 2001); *Olson Farms, Inc. v. Barbosa*, 134 F.3d 933, 936 (9th Cir. 1998);
 28 *Worldwide Church of God v. McNair*, 805 F.2d 888, 891-92 (9th Cir. 1986). The

1 *Rooker-Feldman* doctrine applies “where a party in effect seeks to take an appeal
 2 of an unfavorable state-court decision to a lower federal court.” *Lance v. Dennis*,
 3 *supra*, 546 U.S. 459 [126 S. Ct. 1198, 163 L. Ed. 2d 1059] (2006).

4 That Plaintiff only lost initially, then ultimately prevailed, is of no moment.
 5 This court cannot pass upon Plaintiff’s claims without reviewing, relying on or
 6 reversing the California state court decisions. That is the very essence of the
 7 *Rooker-Feldman* doctrine. Based on principles of federalism and comity, this
 8 Court must assume that the state courts were and are competent to resolve the
 9 issues which Plaintiff raised.

10 All three requirements of the *Rooker-Feldman* doctrine are satisfied in this
 11 case: (1) “the party against whom the doctrine is invoked must have actually been a
 12 party to the prior state-court judgment or have been in privity with such a party”, as
 13 was Plaintiff here; (2) “the claim raised in the federal suit must have been actually
 14 raised or inextricably intertwined with the state-court judgment”; and (3) “the
 15 federal claim must not be parallel to the state-court claim.” *Lance v. Dennis*,
 16 *supra*, 546 U.S. 459 [126 S. Ct. 1198, 163 L. Ed. 2d 1059] (2006).

17 Accordingly, the instant action should be dismissed.

18 **E. Plaintiff Cannot State a Claim for Conspiracy.**

19 To establish Judge Rubin’s liability for a conspiracy, Plaintiff must
 20 “demonstrate the existence of an agreement or meeting of the minds to violate
 21 constitutional rights.” *Mendocino Environmental Ctr. v. Mendocino County*, 192
 22 F.3d 1283, 1301 (9th Cir. 1999) (citations and quotations omitted). Judge Rubin
 23 must have, “by some concerted action, intended to accomplish some unlawful
 24 objective for the purpose of harming another which results in damage.” *Id.*
 25 (citations and quotations omitted). The agreement need not be overt, and may be
 26 based on circumstantial evidence. *Id.* at 1302.

1 No such facts have been or can be alleged here, where a state court judge
2 merely ruled in a criminal action properly pending before him.¹⁷

3 Alternatively, Plaintiff may also be attempting to allege a conspiracy claim
4 under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.
5 §§ 1961-1968. Because Plaintiff failed to properly allege any substantive RICO
6 violation, any putative RICO conspiracy claim also fails. See 18 U.S.C. § 1962,
7 subd. (d); *Howard v. America Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000).¹⁸

8 Plaintiff's Complaint does not plead the requisite elements, or indeed set
9 forth any facts pertinent to this moving Defendant. Resort to judicial process does
10

11 ¹⁷ Moreover, there is no evidence of any intent by the California Legislature
12 to create a private right of action under Penal Code section 182, which by its
13 express terms references only criminal prosecution for any violations. (See
14 *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 305 (1988);
15 *Animal Legal Defense Fund v. Mendes*, 160 Cal. App. 4th 136 (2008),
16 <http://www.courtinfo.ca.gov/cgi-bin/opinions.cgi>; and see also, *Carlsbad*
17 *Aquafarm, Inc. v. Department of Health Services*, 83 Cal. App. 4th 809, 817 (2000)
18 [plaintiff was not entitled to recover damages for the state's alleged violation of its
19 procedural due process rights].)

20 ¹⁸ To state a civil claim for violation of RICO, a plaintiff must allege (1)
21 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5)
22 causing injury to plaintiff's business or property. *Chaset v. Fleer/Skybox Int'l*, 300
23 F.3d 1083, 1086 (9th Cir. 2002). "[T]o show a pattern of racketeering activity, a
24 RICO plaintiff must 'show that the racketeering predicates are related, and that they
25 amount to or pose a threat of continued criminal activity.'" *Sever v. Alaska Pulp*
26 *Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992) (quoting *H.J. Inc. v. Northwestern Bell*
27 *Telephone Co.*, 492 U.S. 229, 239 [109 S. Ct. 2893, 106 L. Ed. 2d 195] (1989)).
28 "Predicates are related if they have the same or similar purposes, results,
participants, victims, or methods of commission, or otherwise are interrelated by
distinguishing characteristics and are not isolated." *Id.*, at 1535. "Continuity is
demonstrated if the illegal conduct poses a threat of continued criminal activity,
such as when the illegal conduct is 'a regular way of conducting [a] defendant's
ongoing legitimate business.'" *Id.* (quoting *H.J. Inc. v. Northwestern Bell*
Telephone, 492 U.S. 229, at 239, 243).

not constitute the kind of wrongful use of force or threats contemplated under RICO. See by analogy, *Wilkie v. Robbins*, No. 06-219, 551 U.S. __ [127 S. Ct. 2588, 168 L. Ed. 2d 389] (June 25, 2007) [public employees not liable under RICO for enforcing government claims].¹⁹

V.

CONCLUSION

For the reasons stated, Defendant Judge Rubin prays that the instant action be dismissed with prejudice, and judgment entered for him.

Respectfully submitted,

DARLENE A. DORNAN, Court Counsel
Superior Court of California, County of San Diego

DATED:

May 21, 2008

By: s/ Cheryl L. Brierton
CHERYL L. BRIERTON, Litigation Attorney
Attorney for Defendant, The Honorable David
Rubin, Judge of the Superior Court of California,
County of San Diego

¹⁹ *Royce Int'l Broadcasting Corp. v. Field*, No. C 99-4169 SI, 2000 WL 236434, at *5, 2000 U.S. Dist. LEXIS 2369, at *14 (N.D. Cal. Feb. 22, 2000). ("[R]esort to the judicial process to resolve a... dispute does not constitute the kind of wrongful use of force or threats contemplated by the federal RICO statute.") (citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 [81 S. Ct. 523, 5 L. Ed. 2d 464] (1961)). Cited by analogy to Federal Rules of Appellate Procedure, Rule 32.1, as amended January 1, 2007.